Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	
High-Cost Universal Service Support	WC Docket No. 05-337
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link Up	WC Docket No. 03-109
Universal Service Contribution Methodology	WC Docket No. 06-122
Numbering Resource Optimization	CC Docket No. 99-200
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Intercarrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68
IP-Enabled Services	WC Docket No. 04-36

Comments of the USA Coalition & Rural Cellular Association

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Summary

The specific requirements of the Communications Act of 1934, as amended, (the "Act") must be the foundation for any reform of the universal service program. In this regard, the United States Court of Appeals for the Tenth Circuit twice now has directed the Federal Communications Commission to define key terms in section 254 in a manner consistent with the rest of the Act. As the Tenth Circuit has ruled, the Commission cannot implement section 254 until it has defined these key terms. Inexplicably, none of the reform proposals even attempts to define the key terms of section 254 or analyze whether the reform proposals are consistent with the requirements and goals of the Act, which cripples the reform efforts and threatens to derail meaningful and sustainable universal service reform. Therefore, the USA Coalition and RCA urge the Commission to comply with the Tenth Circuit's order by defining key terms of the Act, articulating concrete and measurable goals for the universal service program, and adopting reform that is designed to achieve these goals in a manner that is consistent with the Act's requirements.

The proposal to impose a permanent funding cap locking in support for all carriers at 2008 levels is one of the most troubling aspects of all three proposed orders. A permanent cap would lock into place the alleged flaws of the current system and fail to advance the goals of universal service. Indeed, a cap cannot be justified even under the current distribution methodology. Similarly, phasing out support to competitive eligible telecommunications carriers ("ETCs") would be arbitrary and capricious and fundamentally inconsistent with the Act.

The proposals claim they would ensure that broadband Internet access service is deployed quickly to all areas of the country. However, the proposals amount to nothing more than an ultimatum requiring that every ETC commit to providing broadband Internet access

service to every subscriber or lose USF support altogether. The mandate would be entirely unfunded since the proposals would not add broadband Internet access to the list of universal service supported services, and therefore ETCs would remain prohibited from using any USF support to deploy broadband Internet access services. As such, the proposals not only would inhibit the deployment of wireless broadband services in rural, high-cost and insular areas, but they also would halt deployment of all wireless services in some areas. The unfunded broadband mandate cannot be justified under the Act, because it is inconsistent with many of the universal service principles and it would not advance universal service.

The proposed cost study requirements similarly are unjustifiable and fundamentally inconsistent with the Act. The proposal essentially would require competitive ETCs to track their own costs for the purpose of dividing them by the incumbent LEC's line count, so that competitive ETCs can continue to receive amounts of support capped at levels determined by a 2008 measure of the incumbent carrier's cost-per-line. Each metric used in the proposed mechanism is unrelated to the others, making this scheme arbitrary and capricious.

The proposed reverse auctions are discriminatory and inconsistent with the requirements of the Act. Any proposal that would award support to only one or two auction winners is fundamentally inconsistent with the Act's goal of promoting competition and new technological development for consumers living in rural, high-cost and insular areas.

Finally, the proposed hybrid contribution methodologies would be complex and harder to administer than a pure revenues- or connections-based methodology, particularly in light of the limits on the Commission's authority. As such, the Commission should consider a pure connections-based contribution methodology instead.

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Comments of the USA Coalition & RCA

The Universal Service for America Coalition ("USA Coalition") and Rural Cellular Association ("RCA") (collectively, the "Joint Commenters"),[1] by its attorneys, hereby submit these comments in the above-captioned proceeding in response to the Further Notice of Proposed Rulemaking issued on November 5, 2008.[2]

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1 The members of the USA Coalition include Carolina West Wireless, Cellular One, Cellular South, Corr Wireless Communications, Mobi PCS, SouthernLINC Wireless, Thumb Cellular LLC and US Cellular.

2 *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Services; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, WC Docket No. 05-337, CC Docket No. 96-45, WC Docket No. 03-109; WC Docket No. 06-122, CC Docket No. 99-200, CC Docket No. 96-98, CC Docket No. 01-92, CC Docket No. 99-68, WC Docket No. 04-36, Order on Remand & Report & Order & Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008).

I. INTRODUCTION

The USA Coalition consists of eight of the nation's leading rural providers of wireless services, and is dedicated to advancing regulatory policies that will enable Americans to enjoy the full promise and potential of wireless communications, regardless of where they live and work. The Coalition seeks to ensure that our nation's universal service programs are technologically and competitively neutral, which ultimately will facilitate competition that benefits consumers.

RCA is an association representing the interests of approximately 100 small and rural wireless licensees providing commercial services to subscribers throughout the nation. RCA's wireless carriers operate in rural markets and in a few small metropolitan areas. No member has more than one million customers, and all but two of RCA's members serve fewer than 500,000 customers.

A vibrant, robust, and redundant communications network is essential to the economic strength of the United States and the public safety of its citizens. In order to ensure the strength of the communications network in rural, insular, and high-cost areas, service must be affordable to residents of those areas. In some rural, insular, and high-cost areas, however, service will be affordable only with support from the Universal Service Fund ("USF").

Universal service support must be made available in a technologically and competitively neutral manner so that technological innovation can be implemented into the communications network as rapidly and efficiently as possible.[3] Favoring one type of

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[3] *See* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); *see also infra* note 17 discussing principles of competitive neutrality.

technology or class of carriers, whether explicitly or implicitly, will only slow the integration of technological innovation into the communications network and increase inefficiencies.[4] The Joint Commenters believe that allowing residents and businesses in rural, insular, and high-cost areas to select the services, technologies, and service providers of their choice is the best means for ensuring the vibrancy, robustness, and redundancy of the communications network.

Support also must be allocated and distributed in the manner that best facilitates the universal availability of affordable services. This goal requires the Commission to focus primarily upon the consumer, rather than upon the service provider.[5] Consumers want, and need, the ability to choose among various types of affordable services, service providers, and technologies. The support distribution methodology should neither encourage nor require any carrier to become more inefficient, or to comply with unnecessarily burdensome requirements, merely to receive universal service support. At a minimum, mandated inefficiency increases the cost of providing service, which will cause the fund to grow unnecessarily. In a worst case scenario, carriers would choose to forgo support and not offer service, which would limit the options available to consumers in rural, insular, and high cost areas where support is necessary to ensure the availability of affordable services.

Unfortunately, each of the proposals on which the Commission requested comment are fundamentally inconsistent with the Act, and none would ensure that broadband Internet access service is deployed quickly to all areas of the country. As explained below, the

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4 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499, ¶ 7 (Aug. 8, 1996) ("By reforming the collection and distribution of universal service funds, the states and the Commission would ensure that the goals of affordable service and access to advances services are met by means that enhance, rather than distort, competition.") (*Local Competition Order*).

5 *See Alenco Commc'ns v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers.").

proposals not only would inhibit the deployment of wireless broadband services in rural, high-cost and insular areas, but they also would halt deployment of ***all*** wireless services in many areas. Therefore, the Joint Commenters urge the Commission to reject the proposals and to ensure that universal service support is distributed as efficiently as possible in a technologically and competitively neutral manner.

II. ALL THREE PROPOSALS FAIL TO DEFINE KEY TERMS AND OBJECTIVES OF THE UNIVERSAL SERVICE PROVISIONS OF THE ACT

The role of the Commission is to implement the universal service provisions of the Act as it exists today, even if the Act could be improved. As such, the specific requirements of the Act must be the foundation for any reform of the universal service program. In this regard, the United States Court of Appeals for the Tenth Circuit twice now has directed the Commission to define key terms in section 254 in a manner consistent with the rest of the Act.[6] As the Tenth Circuit has ruled, the Commission cannot implement section 254 until it has defined these key terms.[7]

Inexplicably, none of the proposals even attempts to define the key terms of section 254, despite the Tenth Circuit's stated expectation that the Commission would "comply with [the] decision in an expeditious manner, bearing in mind the consequences inherent in further delay."[8] Rather, the proposals released with the NPRM are virtually silent as to nearly all

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6 *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234, 1247 (10th Cir. 2005) (Qwest II) (rejecting Commission's USF definitions for failure to adequately consider all the principles enumerated in 47 U.S.C. § 254, including "reasonably comparable," "just, reasonable and affordable," and "sufficient").

7 *Qwest II*, 398 F.3d at 1234 (""the plain text of the statute mandates that the FCC 'shall' base its universal policies on the principles listed in § 254(b) ... the FCC's duty is mandatory.") (internal citations omitted).

8 *Qwest II*, 398 F.3d at 1239.

of the principles enumerated in the Act and completely ignore the Tenth Circuit's order.[9] Instead, all three proposals focus almost exclusively on "cost-cutting" measures, including measures designed to prevent competitive ETCs from participating in the universal service program altogether, which is a goal that is completely unmoored from the Act itself.[10]

As ordered by the Tenth Circuit in *Qwest II*, the Commission must define key terms of section 254, including "reasonably comparable," "sufficient," and "affordable."[11] Until the Commission adopts specific definitions for these terms, proposals for reform of the universal service distribution mechanism cannot be analyzed to determine which would best further the goals of the Act. Similarly, until the Commission adopts specific goals for the universal service program based upon the requirements of the Act, the agency cannot reasonably determine which reform proposal would best implement the universal service provisions of the Act.[12]

As a starting point for addressing reform and adopting the necessary definitions, the Commission should reaffirm that "reasonably comparability" of services, service providers,

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9 The three proposals each cite to *Qwest II* only once, and do not reference the court's order to define the terms of the statute. See Appendix A ¶ 15 n.55; Appendix B ¶ 15; Appendix C ¶ 15.

10 Appendix A ¶ 2 ("We have seen unprecedented growth in the universal service fund, driven in significant part by increased support for competitive eligible telecommunications carriers"); Appendix C ¶ 2 (same); Appendix B ¶ 3 ("[O]ur method of distributing support even to new competitive carriers is not designed to bring those competitive choices to all Americans, but, rather, it has created incentives for multiple competitive carriers to avail themselves of "identical support" in areas where the legacy network provider receives the largest subsidies."); Appendix B ¶ 4 ("In short, we are spending more and more of contributors' universal service dollars, with less and less to show for it").

11 *Qwest II*, 398 F.3d at 1234-36.

12 On September 12, 2008 the Commission released a Notice of Inquiry seeking comment on the goals of the universal service provisions of the Act. *See Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Notice of Inquiry, WC Docket No. 05-195, ¶¶27-29 (rel. Sept. 12, 2008).

and rates is the touchstone principle of the universal service provisions of the Act.[13] When this touchstone principle is read in conjunction with the other principles established by the Act,[14] the goal of the universal service distribution mechanism becomes clear: the choices available to consumers in rural, insular, and high-cost regions of the United States should be "reasonably comparable" to those available in urban areas with respect to the following factors:

- Service Types: Consumers in high-cost areas should have access to service offerings generally available in urban areas (*e.g.*, voice, mobility, broadband, text messaging, etc.);
- Service Providers: Consumers in high-cost areas should be able to choose among a "reasonably comparable" number of telecommunications and information service providers; and
- Service Rates: The FCC should conduct surveys to determine average rates for supported services in urban areas by state, and then define rates in high-cost areas that are within one standard deviation of rates for technologically similar services in urban areas to be "reasonably comparable" to urban rates, as well as "just, reasonable and affordable."

The Commission must then apply this general goal to current data regarding the services, service providers, and rates available in urban areas in order to establish specific and measurable goals for the universal service program. Only after the Commission has defined success in a concrete

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13 Letter from USA Coalition to Chairman Martin, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (filed Oct. 27, 2008); Letter from USA Coalition to Chairman Martin, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (filed Sep. 30, 2008); 47 U.S.C. § 254(b)(3). The Commission has found that "section 254(b)(3) reflects a legislative judgment that all Americans, regardless of income, should have access to the network at reasonably comparable rates." *Federal State Joint Board on Universal Service; High-Cost Universal Service Support*, Notice Of Proposed Rulemaking, 20 FCC Rcd 19731, 19736-37, 10 (2005). This principle subsumes questions of "just, affordable, and reasonable rates" because the Commission can reasonably find that rates "reasonably comparable" with urban rates are "just, affordable, and reasonable" by definition.

14 *See* 47 U.S.C. § 254(b); *see Qwest II*, 398 F.3d at 1233-37 (discussing principles of affordability, reasonable comparability, predictability, and sufficiency); *See* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to promote competition ... regardless of where [Americans] live and work.").

and measurable way can the agency reasonably determine which reform proposals would most likely achieve that success in a manner that is consistent with the requirements of the Act.

To date, the Commission has not even attempted to comply with the Tenth Circuit's order, and the fundamental inconsistency of the proposed orders with the requirements of the Act is immediately apparent. Forging ahead with reform that is unmoored from the requirements of the Act will create uncertainty in the telecommunications marketplace – a result that is indefensible in light of the extraordinary and unprecedented measures the government is taking to stabilize to the economy. The failure to define key terms of section 254 and to analyze whether reform proposals are consistent with the requirements and goals of the Act cripples the Commission's reform efforts and threatens to derail meaningful and sustainable universal service reform.[15] Therefore, the Joint Commenters urge the Commission to comply with the Tenth Circuit's Order by defining key terms of the Act, articulating concrete and measurable goals for the universal service program, and adopting reform that is designed to achieve these goals in a manner that is consistent with the Act's requirements. In so doing, the Commission necessarily must reject the proposed orders in their entirety.

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15 As the Commission is aware, failure to comply with the directives of the Tenth Circuit likely will lead to legal challenges that will interfere with reform efforts and waste the resources of both the Commission and the industry. *See, e.g., In re Core Communications, Inc.*, 531 F.3d 849, 861-62 (D.C. Cir. 2008) (directing the Commission to respond to the remand in the form of a final, appealable order which explains its legal authority to issue the pricing rules for ISP-bound traffic adopted in the ISP Remand Order).

III. THE PROPOSED PERMANENT CAP ON USF FUNDING IS FUNDAMENTALLY INCONSISTENT WITH THE ACT

The proposal to impose a permanent funding cap locking in support for all carriers at 2008 levels is one of the most troubling aspects of all three proposed orders.[16] The proposals claim that it is "necessary to cap the high-cost mechanism as a first step towards fulfilling our statutory obligation to create specific, predictable and sufficient universal service support mechanisms."[17] Specifically, the proposals state that "[g]iven the excessive growth in high-cost support, we find it necessary to cap this mechanism to ensure that unsubsidized users who contribute to the fund are not harmed by excessive subsidization."[18] The proposals further assert that capping high cost support "will enable ETCs to predict the specific level of support that they will receive should they choose to participate in the program."[19] None of these justifications are sufficient to justify arbitrarily locking in universal service support both by location and amount, particularly when those locations and amounts were established by a system that the Commission claims is fundamentally flawed.[20] A permanent cap simply cannot be squared with the Act or with the need for true reform.

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16 Appendix A ¶ 16 (freezing the total amount of high-cost support disbursed by USAC nationally and each incumbent LECs individual annual high-cost support at 2008 levels); Appendix B ¶ 16 (same); Appendix C ¶ 16 (same).

17 Appendix A ¶ 15; Appendix B ¶ 15; Appendix C ¶ 15.

18 Appendix A ¶ 15; Appendix B ¶ 15; Appendix C ¶ 15.

19 Appendix A ¶ 18; Appendix B ¶ 17; Appendix C ¶ 18.

20 Appendix B ¶ 4 ("In short, we are spending more and more of contributors' universal service dollars, with less and less to show for it"); *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Recommended Decision, 22 FCC Rcd 8998, 8999-9000 (2007) ("the federal universal service fund is in dire jeopardy of becoming unsustainable").

A. A Permanent Cap Would Lock Into Place the Alleged Flaws of the Current System and Fail To Advance the Goals of Universal Service

The Joint Board and the Commission have both claimed that radical and comprehensive reform is crucial because the current system, which allegedly is based on "outdated regulatory assumptions," is fundamentally flawed.[21] The assumption that the current system provides too much support in certain geographic areas and not enough in others underlies the claim that reform is necessary.[22] Therefore, the Commission has made a permanent funding cap that would lock support in at the levels and locations established by the current universal service program a key feature of all three proposals.[23] Given the Commission's claims regarding the effectiveness of the current system, permanently locking in support at the levels established by the allegedly fundamentally flawed system would be nonsensical and arbitrary.

However, a permanent cap would be entirely unnecessary if the Commission were actually adopting meaningful and sustainable universal service reform. A properly functioning universal service program would distribute an amount of support that is sufficient, but not excessive, to achieve the goals of universal service: ensuring that the choices available to consumers in rural, insular, and high-cost regions of the United States are "reasonably comparable" to those available in urban areas with respect to service types, service providers and

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21 Appendix A ¶ 2; Appendix B ¶ 2; Appendix C ¶ 2; *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 19 FCC Rcd 11538, 1 (2004) (Rural Referral Order); *see also Rural Task Force Order*, 16 FCC Rcd at 11268-70.

22 Indeed, the Commission and the Joint Board have both conducted inquiries into the benefits of disaggregation of support, which would allow "carriers to target explicit support to regions within a study area that cost relatively more to serve," while preventing other carriers "from receiving greater support than needed to serve relatively low-cost regions." *Federal-State Joint Board on Universal Service Seeks Comment on Long Term, Comprehensive High-Cost Universal Service Reform*, Public Notice, FCC 07J-2, 6 (rel. May 1, 2007).

23 Appendix A ¶ 14 ("[W]e find that, to manage the high-cost support mechanism effectively, we must control its growth, and that capping support . . . will provide specific, predictable, and sufficient support to preserve and advance universal service."); Appendix B ¶ 14 (same); Appendix C ¶ 14 (same).

services rates. A funding cap demonstrates that the proposed distribution methodology is incapable of determining where, and in what amount, support should be distributed. In short, an arbitrary funding cap at best addresses symptoms of flaws rather than the flaws themselves.

The proposed cap would also thwart the goals of the Act, which promised to "preserve **and advance**" universal service.[24] Universal service cannot be "advanced" by providing static support to carriers in some rural, high-cost and insular areas and denying support altogether in other areas where support also is needed to advance universal service.[25] Rather than "preserving and advancing" universal service, the sole purpose of a cap is to control and limit fund size. A cap certainly does ensure that the fund will not grow, but it does so at the expense of the goals of universal service. The Act requires the Commission to advance all of the goals of universal service; the Commission may not pursue one particular goal to the practical exclusion of all others.[26] As such, the Commission cannot justify the cap solely based on a finding that its new proposal will result in greater "predictability."[27] Rather, the Commission must explain how its actions would impact the Commission's pursuit of all the goals of the Act,

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24 47 U.S.C. § 254(b)(5) (emphasis added); see also Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to encourage the rapid deployment of new telecommunications technologies").

25 *See cf. Qwest II*, 536 f.3d 1236 (holding that the Commission may not ignore its obligation to "advance universal service" in favor of "preserving" the universal service status quo).

26 *Qwest II*, 536 F.3d 1236 (remanding USF Order on Remand to Commission in part because "[t]he FCC's definition of 'sufficient' ignores the vast majority of § 254(b) principles by focusing solely on the issue of reasonable comparability in § 254(b)(3).").

27 The imposition of the cap would not make support any more predictable for service providers than would a stable and permanent distribution mechanism that is consistent with the Act. Indeed, under the reasoning articulated in the proposals, the Commission could set the cap at any arbitrary amount – including $0 – because any level would be equally as predicable as another. Accordingly, "predictability" cannot be relied upon to justify an arbitrary funding cap, regardless of the level of that cap. To do so would subvert the purposes of the Act.

including "predictability," "affordability," "reasonable comparability," and the development of competitive markets.[28]

The adoption of a permanent cap would signify that the Commission has failed in its reform efforts, particularly in light of the agency's previous assurances to the public that the cap would "remain in place only until the Commission adopts comprehensive, high-cost universal service reform."[29] Indeed, the alleged need for a funding cap demonstrates that the proposed reforms to the distribution mechanism are themselves fundamentally flawed and thus inconsistent with the Act.

B. A Cap Cannot Be Justified Even Under the Current Distribution Methodology

The proposed orders attempt to justify the imposition of the cap by pointing out that "high-cost support has increased by 240 percent" since 1997.[30] However, the comparison between 1997 and 2008 is disingenuous because rapid growth of the Fund was to be expected in the early years of competitive ETC market entry, particularly in light of the rapid growth in new telecommunications services such as wireless services.[31] Indeed, Congress intended the Act to facilitate this entry – in discussing the need to protect and advance universal service, the Senate Committee Report for the 1996 Act noted that Congress was opening up the local telephone market for competition by entities including "cable, wireless, long distance, and satellite

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28 *See* 47 U.S.C. § 254(b); *see Qwest II*, 398 F.3d at 1233-37 (discussing principles of affordability, reasonable comparability, predictability, and sufficiency); *See* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to promote competition ... regardless of where [Americans] live and work.").

29 *Rural Task Force Order*, 16 FCC Rcd. at 11252-55.

30 Appendix A ¶ 14; Appendix B ¶ 14; Appendix C ¶ 14.

31 The Commission's statistics also fail to take into account inflation, which resulted in a 36.3% decrease in the value of the dollar as measured by the Consumer Price Index. *See* http://www.coinnews.net/tools/cpi-inflation-calculator/.

companies, and electric utilities, as well as other entities."[32] Thus, growth in the size of the fund (and in particular, growth on the competitive ETC side of the fund) is a sign of success of the program – not its failure.

Nor is the allegedly rapid growth of the fund a sign that the fund is unsustainable.[33] Rather, the key measure of fund viability is the amount each month individual users must contribute to the fund.[34] By that measure, the fund is not facing a crisis, despite the Commission's claims that the cap is "necessary . . . to ensure that unsubsidized users who contribute to the fund are not harmed by excessive subsidization."[35] Indeed, a typical wireline consumer with a $50 phone bill pays a total of slightly more than one dollar of USF support each month.[36] These minimal amounts give lie to Commission justifications that the cap is necessary to protect consumers. Furthermore, the universal service contribution rate shows no sign of

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32 S. Rept. 104-23, at 5.

33 Appendix A ¶ 8 ("High-cost support for competitive ETCs has grown rapidly over the last several years, which has placed extraordinary pressure on the federal universal service fund."); Appendix B ¶ 8; Appendix C ¶ 8.

34 Because end users ultimately bear the cost of universal service, an end user analysis is the only rational and legitimate metric for monitoring the viability of the high-cost support mechanism.

35 Appendix A ¶ 15, Appendix B ¶ 15, Appendix C ¶ 15.

36 A wireline customer with a $50 per month bill currently pays approximately $1.20 per month in USF contributions. This can be calculated by multiplying the base amount of the bill ($50) by the average interstate traffic percentage (12%) and multiplying the resulting sum by the current USF contribution factor (11.4%), and then including the USF obligation generated by the Federal Subscriber Line Charge ($0.54) to the amount a consumer pays monthly for USF support. *Trends in Telephone Service*, Industry Analysis and Technology Division, WCB, Table 2.10 (Aug. 2008) *available at* http://www.fcc.gov/wcb/iatd/trends.html; Universal Service: What are We Subsidizing and Why?: Hearings before the House Energy & Commerce Committee, 110th Cong. 5 (June 21, 2006) (explaining that even local telephone subscribers that make no long distance calls pay $0.54 per month into USF); *cf. Ex Parte Comments of Vonage, Federal-State Joint Board on Universal Service, IP-Enabled Services*, CC Docket No. 96-45, WC Docket No. 04-36, at fn. 5 (filed June 14, 2006) (using different assumptions [e.g., lower bills, higher interstate revenue percentages] to calculate that an average wireline carrier pays USF charges of $1.38 per customer and a CMRS carrier pays $1.21 per customer).

rising uncontrollably; for the fourth quarter of 2008, the contribution rate held steady at 11.4%, down from its April 2007 high.[37]

IV. PHASING OUT SUPPORT TO COMPETITIVE ETCS IS ARBITRARY AND CAPRICIOUS AND FUNDAMENTALLY INCONSISTENT WITH THE ACT

The proposed complete phase-out of USF support to competitive ETCs in Proposal C violates the statutory framework for universal service established in the Act and contravenes the principle of competitive neutrality, and as such must be rejected.[38] Indeed, Proposal C fails to provide either a statutory or logical justification for the complete elimination of support for competitive ETCs. Rather, Proposal C makes an unexplained leap from adopting the Joint Board's "recommended elimination of the identical support rule" to the complete elimination of any type of support for competitive ETCs.[39] Although parties might disagree as to whether identical support is mandated by the principle of competitive neutrality, the terms of the Act and Commission precedent cannot be squared with the complete elimination of universal service support to competitive ETCs.

Section 214 of the Act provides that any "common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in

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37 *Proposed Fourth Quarter 2008 Universal Service Contribution Factor*, Public Notice, CC Docket No. 96-45, DA 08-2091 (rel. Sep. 12, 2008) (establishing a contribution factor for the fourth quarter of 2008 of 11.4 percent).

38 Appendix C ¶ 52. In addition to the six statutory principles that govern the universal service program, the Commission exercised its authority under 47 U.S.C. § 254(b)(7) to adopt a seventh principle which mandates that the universal service support mechanism operate in a competitively neutral manner. Competitive neutrality is defined to mean that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801, 47 (1997) (First Report & Order). The United States Court of Appeals for the Fifth Circuit similarly has held that competitive neutrality is an integral component of ensuring that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000).

39 Appendix C ¶¶ 51-52.

accordance with section 254." Had Congress intended to provide support only to incumbent LECs, it could certainly have done so; Congress instead explicitly mandated that the universal service program make support available to all ETCs as a means of achieving the goals of the Act.[40] Indeed, the Act mandates the establishment of a "pro-competitive, de-regulatory national policy framework" and establishes a system designed to encourage competitors to enter markets previously dominated by incumbents.[41] Consistent with this mandate, the universal service provisions of the Act are designed to ensure that consumers in rural, high-cost and insular areas can enjoy the same benefits from competition that consumers in urban areas enjoy. Denying universal support to competitive ETCs would relegate rural American communities to monopolistic backwaters, which is exactly the opposite result mandated by the Act.

The Act requires not only that competitive ETCs must be eligible to receive universal service support but also that support be distributed in a technologically and competitively neutral manner.[42] Accordingly, the amount of support provided to competitive ETCs must be "explicit and sufficient to achieve the" goals of section 254.[43] The phase out of funding is in direct contradiction of this goal in any insular, high-cost, or rural area where such funding is necessary to build or maintain networks.

The principle of competitive neutrality similarly prohibits the complete denial of funding to competitive ETCs. The principle of competitive neutrality mandates that "universal

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40 *Compare with* 47 U.S.C. § 251(c) (establishing "additional obligations on incumbent local exchange carriers").

41 *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87 at ¶ 23 (1996) (*Joint Explanatory Statement*) (cited in *First Report & Order*, 12 FCC Rcd at 8802, ¶ 48); *see also* 47 U.S.C. § 251.

42 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801, 47 (1997) (First Report & Order) (defining "competitive neutrality" as "mechanisms and rules [that] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another").

43 47 U.S.C. § 254(e).

service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[44] By phasing out support to competitive ETCs while leaving support in place for incumbent LECs, the proposed orders would bias the marketplace and provide a clear advantage for incumbent LECs as compared to the competitive ETCs.[45] The Commission must reject any proposal that calls for the phase out of funding to competitive ETCs while still providing support for incumbents.

V. THE PROPOSED ORDERS WOULD INHIBIT DEPLOYMENT OF ALL BROADBAND SERVICES, INCLUDING WIRELESS BROADBAND

The proposals claim that they take a "monumental step toward our goal of ensuring that broadband is available to all Americans . . . by requiring that all recipients of high-cost support offer broadband Internet access service to all customers within their supported areas as a condition of receiving future support."[46] The proposals further claim they will "ensure that broadband Internet access service is deployed quickly to all areas of the country, including rural and insular areas."[47] However, the proposals amount to nothing more than an ultimatum that every ETC commit to providing broadband Internet access service to every subscriber or lose USF support altogether.[48] The broadband mandate would be entirely unfunded since the

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44 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801, ¶ 47 (1997) (*First Report & Order*).

45 *See* Letter from Senators Rockefeller, Pryor, Dorgan, Klobucher, and Smith, to Commissioner Tate and Oregon PUC Chairman Baum (May 21, 2007) ("It seems worthwhile to us ... [to] seriously consider competitively neutral proposals, ensure accountability for how funds are used, and promote build out of advanced services in rural regions through effective targeting of funds to high-cost areas.").

46 Appendix A ¶ 4; Appendix C ¶ 4; *see also* Appendix A ¶ 3 (stating the Commission seeks to "spur widespread deployment of broadband by ensuring that carriers receiving universal service high-cost support offer broadband throughout their service area."); ; Appendix C ¶ 3 (same).

47 Appendix A ¶ 12; Appendix C ¶ 12.

48 The proposals would condition continued USF support on ETCs "offer[ing] broadband Internet access service, along will all supported services, to all customers throughout their

proposals would not add broadband Internet access to the list of universal service supported services, and thus ETCs would still be prohibited from using any USF support to deploy broadband Internet access services.[49]

The obvious goal of the proposed unfunded broadband mandate – particularly when combined with the cost showing and support phase-out requirements – is to discourage competitive ETCs from seeking universal service support by imposing conditions so onerous that continued participation in the universal service program becomes infeasible. Incumbent LECs would be protected from the impact of the unfunded mandate because the mandate would be lifted altogether for the incumbent LEC if no competitive ETCs were ready, willing and able to meet the mandate. As such, in reality the proposals have nothing to do with increasing the availability of broadband in high-cost, rural and insular areas, and they would not do so. Ultimately, the unfunded broadband mandate cannot be justified under the Act, because it is inconsistent with many of the universal service principles and it would not advance universal service.

The Joint Commenters support efforts and programs to facilitate broadband deployment throughout the United States. The most efficient way to facilitate broadband deployment is to make support for broadband facilities available to all ETCs in a competitively and technologically neutral manner. Some competitive ETCs, including some members of the USA Coalition and RCA, would begin deploying broadband services today under the current rules if they were permitted to use USF support for broadband facilities and networks. Lifting

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service areas by the end of a five- or ten-year build-out period." Appendix A ¶ 52, 25; Appendix C ¶ 25; *see also* Appendix A ¶ 20 ("We make offering broadband Internet access a condition of being eligible to receive high-cost support... [Only t]hose who make [a broadband] commitment will continue to receive their support"); Appendix B ¶ 20 (same).

[49] Appendix A ¶ 21, n.61; Appendix C ¶ 21, n.62.

the prohibition on using USF support to fund deployment of broadband facilities, networks and services would be a much more effective way of ensuring that "broadband Internet access service is deployed quickly to all areas of the country, including rural and insular areas"[50] than the proposals attached to the Commission's most recent order in this docket.

The proposed orders not only would inhibit the deployment of wireless broadband services in rural, high-cost and insular areas, but they also would halt deployment of ***all*** wireless services in some areas. Under the current system, there is no shortage of incentives for carriers to provide broadband services in rural, insular, and high-cost areas if they profitably can do so.[51] If ETCs are not providing broadband services today, it means either that (1) additional support is necessary in that area, or that (2) the current prohibition on using USF support for broadband facilities and services is interfering with efforts by ETCs to deploy broadband services. In either case, imposing an unfunded broadband requirement would cause some service providers to slow or halt expansion of their networks and, in some cases, to stop providing service in existing areas.

The unfunded broadband mandate likely would slow the deployment of broadband services in high-cost, rural and insular areas. Without the unfunded broadband mandate, some ETCs may find it profitable to deploy broadband services in high-cost, insular or rural areas once their narrowband network is deployed and a customer base is established in an area. If the Commission were to adopt the proposed unfunded broadband mandate, these ETCs may choose to forego support and not serve that area, choosing to focus their efforts on other areas that cost less to serve. Additionally, the unfunded broadband mandate may actually cause

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50 Appendix A ¶ 12; Appendix C ¶ 12.

51 Indeed, the current prohibition on using USF support for broadband facilities prevents some ETCs from expanding their broadband network in order to ensure compliance with the FCC's current rules.

carriers to withdraw non-broadband facilities from areas where service currently is provided through USF support, as that support will no longer be available to them if they cannot provide broadband in that area. The subsequent slowdown in network expansion – both narrowband and broadband – would also have a significant effect on the economy, because the deployment of networks and services – whether narrowband or broadband – creates a large number of jobs for both skilled and unskilled workers.

The negative effects of the unfunded broadband mandate would be felt disproportionately by wireless carriers. The 20% annual build-out requirement included in the proposed orders would, as a practical matter, force a wireless ETC to complete build out of its broadband services in its first year because wireless services, unlike wireline broadband services, cannot be rolled out on a neighborhood-by-neighborhood or line-by-line basis.[52] In order to offer broadband services, a service provider's network must be capable of supporting broadband services throughout a reasonably wide service area, and compatible wireless handsets must be available for sale to customers. As such, a wireless ETC in most cases must be capable of providing broadband service to 100% of a study area by the end of the first year in order to meet a requirement that it provide broadband service to 20% of each of its study areas in that timeframe. The massive costs associated with obtaining the necessary spectrum to support broadband (assuming spectrum is available) and upgrading the carrier's network in a single year is so onerous that most, if not all, wireless ETCs would be forced to forego participation in the universal service program altogether. Indeed, even if a wireless ETC already has sufficient spectrum, the burdens of upgrading its network in one year would likely be too great for most, if not all, wireless ETCs.

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[52] Appendix A ¶ 59.

The Commission's proposal in Appendix A and C to hold reverse auctions in areas where the incumbent LEC is unable or unwilling to provide the mandated broadband services is illogical and unrealistic, unless the true objective is to keep all competitive ETCs from receiving universal service support while freeing the incumbent LEC from the broadband requirement altogether. Under these proposals, where the incumbent LEC cannot or will not offer broadband services, "the Commission will conduct a reverse auction . . . awarding high-cost support to a bidder that will commit to take on carrier of last resort obligations and offer broadband Internet access service throughout the study area."[53] If no bidders agree to provide service for the amount offered to the incumbent LEC in 2008,[54] then the "existing incumbent LEC ... will continue to receive high-cost support" while the Commission "examines these issues."[55] These proposals amount to an escape hatch for incumbent LECs that do not want to offer broadband services since it is highly unlikely that any ETCs will participate in the proposed auctions; if existing ETCs are unable to meet the broadband mandate under current funding levels, they certainly will not be able to do so for even less support. Moreover, it is highly unlikely that any new service providers who are not already ETCs will be able to enter the market and meet the broadband mandate for less support than existing ETCs need, particularly given that existing ETCs already have facilities in place. Given that no bidders are likely to bid, the proposed reverse auctions would have the effect, if not the intent, of merely relieving incumbent LECs of their obligations to provide broadband services where it is unprofitable for them to do so. Indeed, the proposal creates disincentives for incumbent LECs to deploy

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53 Appendix A ¶ 31; Appendix C ¶ 31.

54 Appendix A ¶ 37.

55 Appendix A ¶ 47.

broadband services since they ultimately are likely to be relived of the broadband mandate if they do not.

The Commission cannot adopt any mechanism to facilitate broadband deployment without fully considering all of the statutory principles that govern administration of the Universal Service Fund.[56] In particular, the Commission must consider:

- whether the support distribution mechanism ensures that support is sufficient to fund any broadband mandate;
- whether the types and speeds of the mandated broadband services are "reasonably comparable" to those available to urban consumers;
- whether consumers will have "reasonably comparable" service provider options to chose among for the mandated broadband services;
- whether rates charged for the mandated broadband services will be "reasonably comparable" to the rates charged consumers in urban areas; and
- whether the mandated broadband services will be "just, affordable, and reasonable" for consumers in insular, rural, and high-cost areas.

The proposed orders do not even attempt to address these issues. Moreover, until the Commission adopts definitions for key statutory terms, it cannot determine whether measures to facilitate broadband deployment are consistent with the Act's requirements, as explained above. In any event, there is no evidence on the record in this docket that the proposed unfunded mandate would advance the goals of universal service or increase the availability of broadband services in high-cost, rural and insular areas.

Finally, the broadband measures set forth in the proposals would not apply to providers operating in Alaska, Hawaii, or any U.S. Territories and possessions.[57] Apart from

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56 The Commission's findings as to the need for the broadband mandate is that "making the offering of broadband Internet access service a condition of receiving universal service high-cost support can bring [service to those] who await its deployment." Appendix A ¶ 23; Appendix C ¶ 23.

57 Appendix A ¶ 13; Appendix C ¶ 13.

claiming that "these areas have very different attributes and related cost issues than do the continental states," the proposals do not identify any relevant differences or explain why reforms that allegedly will quickly bring broadband to other parts of the country would not also do so in Alaska, Hawaii and the other U.S. Territories and possessions.[58] In any event, to the extent the broadband measures do not apply in Alaska, Hawaii and the other U.S. Territories and possessions, they similarly should not apply to Tier II and Tier III carriers and carriers serving Tribal Lands who also still need universal service support to continue deploying wireless service to the nation's highest costs areas.[59] Such a "carve-out" could, for example, be based solely on the Tier II, Tier III size or Tribal Lands-serving status of a wireless carrier or, at a more granular level, based upon population densities or zip codes. If the Commission is going to uphold its statutory obligation to ensure that residents of rural areas have access to services that are reasonably comparable to those available in urban areas, it must ensure that Tier II, Tier III and Tribal Lands-serving carriers have an opportunity to deliver those services.

VI. THE PROPOSED COST STUDY REQUIREMENTS ARE UNJUSTIFIABLE AND FUNDAMENTALLY INCONSISTENT WITH THE ACT

When viewed as a whole, the proposed cost showing mechanism articulated in Proposal A is nonsensical: the proposal would require a competitive ETC to track and report only a portion of its costs – excluding perhaps the most significant costs (*i.e.*, spectrum) – solely for the purpose of determining whether the remaining costs, when divided by the incumbent LEC's line counts, meet an arbitrary benchmark that is based on the incumbent LEC's costs and

58 Appendix A ¶ 13; Appendix C ¶ 13.

59 Letter from Rural Cellular Association (RCA) and the Alliance of Rural CMRS Carriers (ARC) to The Hon. Marlene H. Dortch, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, at 5 (Oct. 28, 2008) ("[ARC and RCA] believe that the proposed 'carve-out' should also be extended to Tier II and Tier III carriers and carriers serving Tribal Lands who also still need universal service support to continue deploying wireless service to the nation's highest cost areas.").

line counts rather than the costs and line counts of the competitive ETC.[60] Then, if the competitive ETC meets this benchmark, "that competitive ETC will be entitled to continue to receive support for the relevant service area, frozen at the amount of support, on a lump sum basis, that the competitive ETC received in 2008."[61] Thus, the proposals would essentially require competitive ETCs to track their **own costs** for the purpose of dividing them by the **incumbent LEC's line count**, so that competitive ETCs can continue to receive amounts of support capped at levels determined by a 2008 measure of the **incumbent carrier's cost-per-line.** Each metric used in the proposed mechanism is unrelated to the others, making this scheme arbitrary and capricious in the extreme.

The apparent intent of the cost requirements is to prevent competitive ETCs from receiving any universal service support rather than identifying the true costs of competitive ETCs. This intent is reflected in the unjustifiably discriminatory aspects of the proposal. For example, under the proposed rules "spectrum costs are not included for purposes of calculating a cost per line."[62] Spectrum is a major cost for all wireless carriers, and it is the physical and logical equivalent of wireline plant for traditional wireline carriers. No rational justification exists for the exclusion of these costs for reimbursement from the USF when the analogous costs for wireline carriers are included in carrier cost reports as a matter of course.[63] The exclusion of spectrum also violates the principle of competitive neutrality because it supports wireline ETC's

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60 To the extent the Commission is eliminating the identical support rule, there is no justification for maintaining an arbitrary connection to incumbent LEC costs.

61 Appendix A ¶ 55.

62 Appendix A ¶ 53.

63 The Draft Proposal exempts spectrum costs because "such costs do not represent a direct investment in facilities and infrastructure for the purposes of providing supported services in high-cost areas." Appendix A ¶ 53, n. 148.

methods of transmission while leaving wireless carrier transmission methods unsupported.[64] Similarly, the benchmarks against which competitive ETC are compared are established by examining the costs of traditional wireline carriers alone; other types of service providers are ignored in violation of the principle of competitive neutrality.[65] Indeed, the practical impact of the proposal is to deny new competitive ETCs support altogether – an end result in direct contradiction of the Act's goals of promoting competition regardless of where Americans live and work.[66]

Proposal A's funding benchmark for competitive ETCs also fails as a matter of logic. The Commission claims that "because a competitive ETC may have few or no lines when it first receives its ETC designation, performing a calculation of per-line costs at the initial time of market entry likely would result in a considerable upward bias in the resulting amount."[67] It is true that if a wireless ETC has yet to enter a market or needs support to expand its network, it initially will have lower line counts than the incumbent LEC. However, dividing a competitive ETC's costs by the line count of the incumbent LEC only indicates that a competitive ETC's costs have not yet grown to the size of the incumbent LEC's costs. The metric provides no real information as to the legitimate costs incurred by the competitive ETC in rolling out support, and underestimates a competitive ETC's real cost-per-line for no justifiable reason. Furthermore,

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64 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801, 47 (1997) (First Report & Order) (defining "competitive neutrality" as "mechanisms and rules [that] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.).

65 In order to receive any universal service support a competitive ETC's costs in a given region must be high enough that, when divided by the incumbent LEC's line count, the pseudo-"cost-per-line" exceeds the wireline benchmark for the area or is more than two standard deviations from the national average cost-per-line. Appendix A ¶ 53.

66 *See* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to promote competition ... regardless of where [Americans] live and work.").

67 Appendix A ¶ 54.

one of the major purposes of the universal service program is to provide support for competitive carriers as they enter rural, insular, and high-cost areas or maintain service there because otherwise the barriers-to-entry and maintenance costs are insurmountable.[68] Despite this, the proposed metric would ensure that no such support is available for competitive ETCs unless their costs are higher than those of the incumbent LEC. This provides incentives for competitive ETCs to inflate costs to incumbent LEC levels or risk losing USF support altogether. Indeed, under the proposed plan, only carriers with costs higher than the incumbent LEC would receive funding, destroying efficiency incentives.

VII. THE PROPOSED REVERSE AUCTIONS ARE DISCRIMINATORY AND INCONSISTENT WITH THE REQUIREMENTS OF THE ACT

The proposed order in Appendix B reverses direction and rejects a cost showing requirement for ETCs in favor of the conclusion "that support for ... [all] ETCs should be awarded ... via reverse auction."[69] However, the proposal provides no support or analysis for the conclusion that the reverse auction mechanism it proposes is consistent with the Act and is the best means for advancing the goals of universal services. Rather, the proposal simply concludes that support should be awarded via reverse auction before delving into the mechanics of how such an auction would be administered.[70] Prior to adopting this proposal, the Commission must provide an explanation as to why reverse auctions are superior to the current identical support rule, the cost showing proposed in Proposal A, the forward-looking cost models discussed in previous NPRMs, and any of the other numerous proposals currently before the

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68 *See* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to promote competition ... regardless of where [Americans] live and work.").

69 Appendix B ¶ 20.

70 *Id.*

Commission. Failure to provide this analysis will doom the proposals should they be challenged in court.

To the extent the Commission does address the mechanics of the reverse auction, Proposal B contains provisions fundamentally inconsistent with the terms of the Act. Specifically, any proposal that would award support to only one or two auction winners is fundamentally inconsistent with the Act's goal of promoting competition and new technological development.[71] Indeed, any support that results in a market becoming a *de facto* monopoly or duopoly is unacceptable under the Act. Furthermore, the lack of competition will likely delay the rollout of advanced telecommunications services, and ultimately negatively impact end users.

As drafted, Proposal B is not competitively neutral because it uses the study area of the incumbent LEC as the auction area for the reverse auction.[72] The use of this study area creates an uneven playing field, as incumbent LECs would not be required to modify their service area in order to bid in the proposed reverse auctions. In contrast, many competitive ETCs would likely have to expand their network in order to provide service, driving up their costs. This allows the incumbent LECs to undercut the competitive ETCs because the incumbents need not bear any additional costs to satisfy their bid. A better solution would be to provide support using a geographically neutral territory, such as county lines or zip codes. Proposal B rejects these boundaries because it supposedly "would encourage bidders to bid on areas that are easier or cheaper to serve, leaving our most difficult-to-serve populations without comparable service."[73] However, smaller regions allow more competitors to bid in an area,

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71 *See* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to promote competition ... regardless of where [Americans] live and work.").

72 Appendix B ¶ 22.

73 Appendix B ¶ 22.

driving down USF support in those smaller regions that are easier to serve and where carriers incur lower costs. This will ultimately reduce the burden on the fund. Meanwhile, in more expensive regions, the incumbent LEC is still in a position to provide services without significant increases in support because its facilities are already in place.[74] To the extent that cheaper regions subsidized more expensive regions in an incumbent LEC's study area, the Commission may need to consider raising reserve prices until a carrier bids on all areas.

Regardless of the exact rules of any auction, reverse auctions would be complicated and expensive to administer. To the extent the FCC moves forward with a reverse auction proposal, the agency must conduct limited trials to determine the viability of the mechanism. During the trial period, the identical support rule should be maintained for all non-participating regions, and the interim cap should be removed. Furthermore, and as proposed in the Proposal B, any auction should allow all carriers to participate, regardless of competitive status (*i.e.*, incumbent or competitive ETC) or underlying technology. Upon completion of a trial period, and assessment of the resulting marketplace of telecommunications options for consumers, and whether the intended goals of universal service have been effectively met, the Commission could examine the results and determine whether or not reverse auctions should be deployed on a wider basis.

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74 In essence, the proposed auction areas would result in *de facto* disaggregation as proposed in the Joint Board's recommended decision. *Federal-State Joint Board on Universal Service Seeks Comment on Long Term, Comprehensive High-Cost Universal Service Reform*, Public Notice, FCC 07J-2, 6 (rel. May 1, 2007); *Federal-State Joint Board on Universal Service Seeks Comment on Long Term, Comprehensive High-Cost Universal Service Reform*, WC Docket No. 05-337, CC Docket No. 96-45, 22 FCC Rcd 9023, 9025 (2007).

VIII. THE PROPOSED HYBRID CONTRIBUTION REFORM MECHANISM IS UNNECESSARILY COMPLEX

The proposed orders claim that contribution reform is necessary because revenues have declined[75] and the classification of revenues has become increasingly difficult because of bundled service packages.[76] According to the proposed orders, a hybrid mechanism would serve the public interest by:

- "simplifying" and "stabilizing" the basis for assessments;[77]
- being "easier to administer, facilitating greater regulatory compliance;"[78]
- being "readily applicable to emerging service offerings;"[79]
- creating incentives for providers to use numbering resources efficiently;
- minimizing the potential for providers to engage in "bypass activities."[80]

Unfortunately, the proposed hybrid mechanisms would achieve none of these goals.

A. The Proposed Hybrid Methodologies Would Be Complex and Harder to Administer than a Pure Revenues- or Connections-based Methodology

The hybrid contribution methodologies described in the proposed orders are not simple, and they would not be easy to implement or administer. As an initial matter, hybrid methodologies are inherently more complex than pure revenues- or connections-based methodologies, because service providers must implement, administer and comply with two separate methodologies rather than just one. With respect to the proposed hybrid methodologies, service providers would suffer the detriments associated with each component of the hybrid

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75 Appendix A ¶ 94; Appendix C ¶ 90.

76 Appendix A ¶ 95; Appendix C ¶ 91.

77 Appendix A ¶ 107; Appendix C ¶ 103.

78 Appendix A ¶ 110; Appendix C ¶ 106.

79 *Id.*

80 *Id.*

methodology without enjoying any offsetting benefit because the individual components of each proposal share no common elements that could facilitate efficiencies.

1. Limits on the Commission's Permissive Authority Under Section 254(d) Create Complexity and Ambiguity

Just as with the distribution mechanism, the Commission must ensure that any contribution mechanism it adopts complies with the provisions of the Act. The proposals claim authority to impose a contribution requirement on all telephone numbers, regardless of how they are used, based upon authority granted to the Commission in "section 254(d), Title I, and section 251(e)."[81] However, the proposals merely list these sources of authority and fail to consider whether these sections authorize the Commission to adopt the proposals.

Section 152(b) of the Act denies the Commission "jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communications service."[82] As the Fifth Circuit has noted, to overcome this "statutory presumption" that the Commission lacks authority over intrastate issues, the Commission must point to "unambiguous language showing that the statute [at issue] applies to intrastate matters."[83] Similarly, the Commission has acknowledged that it lacks authority over carriers that provide purely international services because such carriers are not "telecommunications carriers

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81 Appendix A ¶ 98.

82 47 U.S.C. § 152(b) (emphasis added).

83 *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 447-48 (5th Cir. 1999) (citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 380-81 (1999)) (*TOPUC*). The courts have rejected claims that rely upon the Commission's plenary powers or upon statutes that fail to explicitly authorize intrastate action by the Commission. *TOPUC*, 183 F.3d at 447-48; *Qwest v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001); *Vonage v. FCC*, 489 F.3d 1232, 1236 (D.C. Cir. 2007).

that provide interstate telecommunications services."[84] Thus, the sources of the Commission's claimed authority to assess all numbers must be sufficient to overcome these statutory hurdles.

None of the sections of the Act cited in the proposal provide the Commission with the authority to adopt the proposed contribution methodology reforms. The Commission first cites to section 254 of the Act, which "is the cornerstone of the Commission's universal service program."[85] However, not only does section 254 not provide jurisdiction over intrastate services or international services, but it includes additional limitations on the Commission's authority to collect universal service contributions. Under section 254, the Commission must require contributions only from providers of "interstate telecommunications services,"[86] and may require contributions from "[a]ny other provider of interstate telecommunications," but only to the extent that the "public interest so requires."[87] The proposed orders recognize that not every provider which would be subject to the mandatory contribution requirement is a "telecommunications carrier."[88] However, the proposed orders claim that, "[nonetheless], we have authority to require them to contribute."[89] In support of this claim, the proposed orders state merely that "all of these providers provide – directly or indirectly – some amount of interconnection to the public switched telephone network (PSTN)," which benefits consumers"[90] and that "it is in the public interest . . . . that these providers contribute."[91] This blanket statement is insufficient to

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84 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 779 (1997).

85 Appendix B ¶ 46.

86 47 U.S.C. § 254(d).

87 *Id.*

88 Appendix A ¶ 103; Appendix C ¶ 99.

89 Appendix A ¶ 103; Appendix C ¶ 99.

90 *Id.*

91 *Id.*

demonstrate that every provider of a service that uses a number necessarily provides interstate telecommunications, and it does not constitute a reasonable public interest analysis.[92]

The proposed orders do not even attempt to identify the types of services provided by the entities that will be subject to the new contribution methodology, let alone analyze whether the provider furnishes or supplies components of a service that includes "telecommunications" that are interstate in nature.[93] Without undertaking this analysis, it is also impossible to determine whether "the public interest requires contributions by these providers to the federal universal service fund" as required by Section 254(d).[94] Simply stating that every user of a telephone number enjoys the capability of interconnection to the PSTN to their benefit is insufficient to satisfy the statutory standard for permissive authority under Section 254(d); the Commission can make the required findings only on a service-by-service or application-by-application basis.[95]

Given that section 254 provides only limited authority to assess numbers, additional authority must be found in either section 251(e) or Title I, but no such authority

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92 In order to require contributions from these "other providers of interstate telecommunications," the Commission must make a three part finding that: (1) the "provider furnishes or supplies components of a service"; (2) the provider provides "telecommunications" that are interstate in nature; and (3) the public interest requires contributions by these providers to the federal universal service fund. *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7538 (2006) (*Interconnected VoIP USF Order*).

93 *2006 Interim Contribution Methodology Order*, 21 FCC Rcd at 7538-41, ¶¶ 38-45.

94 *Id.*

95 In the same orders, the Commission later contradicts its own assertion of sweeping authority, noting that "in some situations, the entity with the direction relationship with the ultimate end user may not be an entity over which the Commission has exercised its mandatory or permissive authority" to require contributions and that in such situations it would treat any entity over which "permissive authority" has not been exercised as an "end user" and the "underlying carrier or telecommunications provider" as the contributor. Appendix C ¶ 65 (footnotes omitted). This provision would not be necessary if the Commission actually had authority under the Act to implement the proposed contribution mechanism.

exists.[96] Section 251(e) provides the Commission with jurisdiction only to administer the numbering plan itself and to recover costs associated with "administration arrangements."[97] It does not provide any authority to assess charges for other purposes, such as universal service. The Commission's claims to authority under Title I are equally disingenuous as ancillary jurisdiction cannot be used to expand the Commission's authority into areas where the Commission's authority is otherwise limited, lest the jurisdictional limitations in the Act cease to have any meaning.[98] Indeed, the Commission exclusion of purely intrastate numbers from contribution requirements implicitly recognizes that at least some limitations on Commission authority to impose contributions based on numbers usage likely exists.[99]

2. The Complexity of the Proposed Hybrid Mechanism Would Negate Any Benefits Of Reform

The hybrid contribution methodologies described in the proposed orders are very complex, and they would neither be easy to implement nor administer. In fact, the hybrid contribution methodologies described in the proposed orders would be more complex than the current revenues-based methodology because of the numerous distinctions they would add to the contribution methodology. For example, the proposed hybrid contribution methodologies would create the following distinctions, each creating headaches for contributors and end users alike:

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96 *TOPUC*, 183 F.3d at 447-48; *Qwest v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001); *Vonage v. FCC*, 489 F.3d 1232, 1236 (D.C. Cir. 2007).

97 47 U.S.C. § 251(e).

98 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 381 n.8 (1999) ("The Commission could not, for example, regulate any aspect of intrastate communication not governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.").

99 Appendix A ¶ 104 ("We will only require providers to contribute to universal service based on the Assessable Numbers or connections that are capable of originating or terminating interstate or international communications"); Appendix B ¶ 51(same); Appendix C ¶ 100 (same).

- **Residential/Wireless v. Business:** The application of different methodologies to residential/wireless services and business services would force service providers to track accounts by customer type and creates incentives for arbitrage.

- **Entities covered by Section 254 v. Entities not covered by Section 254**: By creating a distinction between entities based upon whether "the Commission has exercised its mandatory or permissive authority under section 254(d)" over them,[100] the proposals would force service providers to track such distinction and make complex decisions about the jurisdictional status of themselves and their customers.

- **NANP Numbers v. NANP Number Equivalents**: By defining Assessable Numbers to include "alternative methods" to bypass NANP-issued numbers to the extent that they "are the functional equivalent of numbers and otherwise meet our definition of Assessable Numbers," [101] the proposals would hopelessly complicate the contribution methodology. If the Commission cannot articulate the specific methods covered by its order, it cannot reasonably expect service providers to do.[102]

- **Number (or number-equivalent)-based Service v. Non-Number based Service**: By making a distinction between number (or number-equivalent)-based service and non-number based services, the proposals would create yet another category that service providers will have to track.

Each of these distinctions increases the complexity and ambiguity associated with the hybrid methodologies described in the proposed orders.

Complexity and ambiguity increase the burdens of compliance, create additional opportunities for arbitrage, and make compliance audits much more difficult, which ultimately would make the contribution mechanism less stable and predictable. [103] Instability harms end users, particularly residential end users who are less likely to be able to take steps to reduce their universal service contribution obligation and who face greater harm from unexpected increases

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100 Appendix B ¶ 65.

101 Appendix A ¶ 129; Appendix B ¶ 77; Appendix C ¶ 125.

102 By not including "alternative methods," the numbers-based methodology would be easy to arbitrage, which highlights the fundamental flaws in the hybrid methodology.

103 Appendix A ¶ 106 ("we find that adoption of a telephone number-based methodology for residential services will help preserve and advance universal service by ensuring a specific, predictable, and sufficient funding source"); 47 U.S.C. § 254(d).

in contribution levels. These complexities, which exceed those associated with the current revenues-based methodology, would negate any benefits of contribution reform. Moreover, the Commission has no basis or record support for its claim that the administrative costs of implementing the reforms would be minor or that these costs would be outweighed by the benefits.[104]

3. The Proposed Distinction Between Residential/Wireless Services and Business Services Would Be Unreasonable and Inequitable

Applying an entirely different contribution methodology to residential/wireless services and businesses services is unnecessary, and the resulting distinctions between contribution rates would be inequitable. Not only would the distinction increase the complexity and ambiguity of the contribution methodology, as described above, but also the flat rate for business connections would result both in over- and under-contributions to the universal service fund in comparison to the numbers-based scheme that applies to residential and wireless services. For example, businesses that use low quantities of numbers and/or high quantities of connections may be forced to over-contribute in comparison to residential and wireless end users. By contrast, businesses that use high quantities of numbers and relatively low quantities of connections may under-contribute in comparison to residential and wireless end users. The proposed orders remain silent with respect to why application of radically different contribution methodologies to these different classes of customers would be appropriate, which is particularly important since businesses use wireless services and small business usage can resemble residential usage in some respects.

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104 Appendix A ¶ 127; Appendix B ¶ 75.

B. The FCC Should Consider Adopting a Pure Connections-Based Contribution Methodology

A pure connections-based contribution mechanism would likely be simpler and easier to administer than a hybrid system. As recognized in the proposed orders, a connections-based contribution methodology would be relatively easy to apply to business services.[105] For the same reasons, a connections-based methodology would be relatively easy to apply to all services, including residential and wireless services. Because numbers are merely proxies for connections, a connections-based methodology would be more stable and much less susceptible to arbitrage.

Connections are also easier to define in a manner that is consistent with the Commission's authority under section 254(d). The Commission can define an "Assessable Connection" as any interstate connection of a given capacity (with contribution levels tied to capacity levels). Service providers could rely upon decades of precedent regarding the jurisdictional classification of connections in order to classify the connections they offer to their customers, which would eliminate the problematic jurisdictional issues associated with numbers-based contribution methodologies. Since connections are the foundation of all telecommunications and information services provided to end users, a connections-based methodology would be much more stable and predictable than a hybrid-methodology that involves a numbers or revenues component, which can fluctuate much more rapidly than connections. Moreover, as the basis for all services provided to end users, connections more directly reflect the benefit that particular end users gain from universal service. To the extent the Commission tentatively concludes that a pure-connections based contribution methodology would be superior to the current revenues approach, it should publish a further notice of

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[105] Appendix A ¶ 131, Appendix B ¶ 79.

proposed rulemaking regarding the details of the reforms, including the definitions and tiers of connections.

A pure connections-based contribution methodology would be easier to administer than a hybrid system. Because a pure connections-based contribution methodology would obviate the need for all of the distinctions necessary under the proposed hybrid systems (*i.e.*, Residential/Wireless v. Business, Entities covered by Section 254(d) v. Entities not covered by Section 254(d), NANP Numbers v. NANP Number Equivalents, Number (or number-equivalent)-based Service v. Non-Number based Service), service providers would not have to track additional categories with each account in order to comply with the contribution methodology, which would ease administrative burdens and facilitate audits by regulatory authorities. Moreover, the service provider, rather than user, would possess all of the information necessary to comply with the contribution methodology, which will decrease burdens and facilitate compliance.

For the same reasons, a pure connections-based methodology would be more stable than a hybrid methodology involving a numbers-based component.[106] Number usage could increase or decrease swiftly since users can relinquish a number without disconnecting service altogether. Indeed, since contribution requirements have never been tied to numbering usage, there is no reliable evidence on the record regarding the likely behavior of consumers with respect to telephone numbers that trigger a contribution requirement. By contrast, however, customers cannot relinquish connections unless they choose not to receive service at all.

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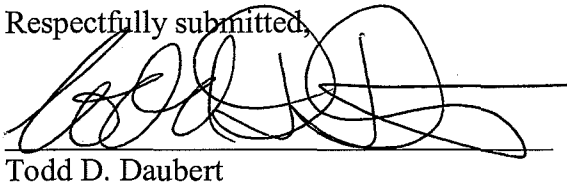
[106] Appendix A ¶ 110; Appendix C ¶ 57.

IX. CONCLUSION

For the reasons set forth above, the USA Coalition and the Rural Cellular Association urge the Commission to reject the proposals published in the *Order & NPRM*, and to carefully consider alternatives that are competitively and technologically neutral.

Respectfully submitted,



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